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Addis Ababa, ETHIOPIA P. O. Box 3243 Telephone: 517 700 Fax : 517844
website : www.africa-union.org

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BRIEF ON NEGOTIATIONS FOR ECONOMIC PARTNERSHIP AGREEMENTS

DEPARTMENT OF TRADE AND INDUSTRY

BRIEF ON EPA NEGOTIATIONS

A, INTRODUCTION

1. Negotiations are taking place between the European Commission and six groups of African Caribbean and Pacific countries. Four of the groups are in Africa: Central Africa (CEMAC), Eastern and Southern Africa (ESA/ COMESA), West Africa (ECOWAS/ UEMOA), and Southern Africa (SADC). The East African Community countries have contemplated forming another negotiating group. The other two are the Caribbean and the Pacific groups.

2. The purpose of the negotiations is to conclude new trade arrangements (economic partnership agreements - EPAs) to replace the old trade arrangements under the Lome Conventions first concluded in 1975 and the current trade arrangements under the Cotonou Agreement concluded on 23 June 2000 in the City of Cotonou. These old trade arrangements were based on the colonial ties between Europe and the African Caribbean and Pacific countries.

3. The new trade arrangements are supposed to replace the old arrangements because the old arrangements were not in conformity with the rules of the World Trade Organisation. They were not in conformity because they gave ACP goods preferential market access to the EU market (lower tariffs and guaranteed quotas), without giving the same level of access to goods from other developing countries in the same circumstances, and in this way discriminating against the other developing countries, which is in contravention of the WTO trade rules requiring non-discriminatory treatment for goods coming from member states of the WTO.

4. According to the Cotonou Agreement, and according to the WTO waiver that allowed the continuation of the regime under the Cotonou Agreement covering only trade in goods, negotiations for the new trade arrangements are supposed to be finalized by December 2007 and the arrangements are to enter force by 1 January 2008. However, according to recent reviews, the negotiations are way behind schedule, with wide divergences on key issues; it is unlikely that ambitious and comprehensive EPAs will be concluded within this timeframe. In some areas there would appear to have been a convergence of views. On this basis, it has been suggested that preliminary EPAs, also called phased EPAs, could be concluded covering the areas where agreement has been reached; with a built-in agenda for subsequently continuing the negotiations in the other outstanding areas. In recent joint ministerial declarations by the negotiating groups and the European Commission, the parties have undertaken to conclude the agreements by December 2007.

5. There is some difficulty, however, in ascertaining the exact degree of agreement in the areas where there is supposed to be convergence of positions; mainly due to differences between political pronouncements by the European Council, the member states and Parliaments on the one hand, and the actual negotiating positions vigorously advanced by European negotiators. This gap needs to be urgently closed and measures taken to ensure that the European negotiators faithfully adhere to pro-development pronouncements of the European Council, member states and parliaments.

6. Also, it remains unclear which proposals from the ACP regions are acceptable to the European Commission; due to back-peddling and reneging on promises in some cases, and in other cases because the details or substance have not been addressed. In market access, for instance, it is not clear whether the European Commission accepts the proposals for long transition periods of up to 25 years, or the exclusion of the sensitive products listed by ACP regions. In rules of origin, it is not clear what will be the threshold for value addition, the method preferred by the European Commission, or whether the method of Change in Tariff Heading preferred by ACP groups will be adopted.

7. A lot of focused work therefore remains to be done, and this should be completed well ahead of the December 2007 deadline if EPAs in some form are to be in force by 1 January 2008. Failing this, transitional measures should be elaborated and finalised not later than November 2007. In any case, producers and exporters in ACP regions and importers in Europe are anxious to know well in advance what the post December regime will be, in order to plan and manage their orders. The European Commission should send out a clear and firm message that trade will not be disrupted even for those countries for which EPAs will not be in force by 1 January 2008 as well as for those countries that might not join the agreements. This would be required as a way of preserving the *acquis* and complying with the requirements in the Cotonou Agreement in good faith.

B, COORDINATION OF EPA NEGOTIATIONS

8. Each of the four negotiating groups of Africa is negotiating separately with the European Commission. This poses the risk of the groups concluding EPAs that are inconsistent with each other or even that contradict the continental programmes for economic integration.

9. To address this issue, the African Union Heads of State and Government, way back in 2003 at the Maputo Summit, requested the Commission of the African Union to coordinate the EPA negotiations among the groups. To this end, African Union Trade Ministers have adopted declarations on EPA negotiations at their annual meetings since 2003: Mauritius (2003), Kigali (2004), Cairo (2005), Nairobi (2006) and Addis Ababa (2007). The declarations are the Common African Positions, to guide the negotiating groups. In the declarations, the Trade Ministers have pronounced themselves on all the key issues. The declarations have been endorsed by the African Union Heads of State and Government.

10. The European Union negotiators should pay heed to these Common African Positions; rather than actively encouraging and pressing the negotiating groups into contrary positions. For instance, the January 2007 African Union Summit held in Addis Ababa, called for more time for the EPA negotiations in light of the delays and the wide divergences, and endorsed the Trade Ministers' Declaration calling for measures to ensure that trade with the European Union was not disrupted for any country should the December deadline not be met. Also, the West African group has called for an extension of the negotiations by up to 3 years, at ministerial and summit level. The ESA Group had at ministerial and summit level had stated that negotiations would not proceed if the development chapter drafted by the group was not to be negotiated. European Union negotiators at around that time embarked upon the offensive of getting the negotiating groups to undertake to finalise the negotiations by December 2007. The European

negotiators have since persistently threatened Africa that without the EPAs, imports from Africa into Europe would face the higher duties under the GSP. Estimates are that the GSP treatment would result in a transfer of 156 million euros annually from ACP countries to the European Union in customs duties. The European Commission seems bent on ignoring its obligations under the Cotonou Agreement to ensure the continuation of the favourable treatment under the Cotonou Agreement and not disrupt poverty-alleviating trade.

11. Another critical matter is that the negotiating groups should endeavour to harmonise the EPAs to be concluded. At their Third Extraordinary Session held in Addis Ababa on 16 January 2007, in their declaration, paragraph 5, the African Union Trade Ministers directed "... the negotiators in each of the regions to ensure that they coordinate the negotiations for EPAs including at the technical level ...". In their Third Ordinary Session held in Cairo on 9 June 2005, the Ministers in paragraph 3 of their declaration "recommended that the different EPA groupings should harmonise their positions on issues of common interest before final decisions are taken". In light of the ministerial decisions, therefore, the negotiating groups should compare and harmonise the text for their EPAs before concluding the negotiations and signing the agreements; and in this regard they may explore the possibility of merging, or how best to harmonise, their EPAs.

C, DEVELOPMENT COOPERATION

12. According to the Cotonou Agreement and the negotiating mandates of the parties, EPAs are required to be instruments for development. Given the development impetus in Africa, this shared emphasis and commitment is welcome, particularly if it accelerates the timely achievement of the Millennium Development Goals, including the reduction of poverty.

13. However, the European Commission negotiators don't seem to have shared the same understanding as the African negotiators, on how development in Africa will be achieved. In the details of the negotiating positions, the European negotiators stress economic liberalisation as the solution. European negotiators have taken positions that in many cases don't quite reflect the political pronouncements of the European Council, the member states and the parliaments.

14. The EC negotiators view development mainly as a process of trade liberalisation and of adopting rules prohibiting discrimination against foreign investors and against foreign bidders for government contracts. EC negotiators have insisted on African negotiating groups adopting common external tariffs and then eliminating those tariffs to substantially all imports from the EU over a period of not more than 12 years. The possibility of longer transition periods for few sensitive products is mentioned but without any indication of the length of this period, or the limits on the range of sensitive products. Development finance receives mention, but mainly in terms of highlighting the nominal increase in development assistance over the years, without positively responding to the ACP proposals for additional resources and a dedicated EPA facility.

15. Africa has not taken this narrow meaning, which moreover is not supported by development experience. Drawing on its experience during the Structural Adjustment Programmes and award-winning literature world wide, Africa has argued that economic liberalisation by itself cannot guarantee development, and pointed out the extensive

protectionism and subsidisation done in developed countries including in Europe. The protectionism limits trade opportunities for African producers. The subsidisation of European producers gives them an unfair advantage over African producers, again limiting trade opportunities.

16. Africa has taken the position that its development requires full duty free and quota free market access to global markets, subject to special arrangements for sensitive products particularly sugar, which further requires that developed countries do not resort to non-tariff barriers such as restrictive rules of origin or unwarranted technical and health standards particularly private sector standards without a scientific basis.

17. Related to this, Africa has taken the position that, in light of its low production capacity and bottlenecks to production, development requires adequate financial and technical resources to address supply side constraints and build infrastructure in order to develop its production capacity for supplying global markets – in this way, trade can assist in eradication of poverty when producers can earn increasing incomes from trade.

18. And in order to continue to have the right and flexibility to undertake necessary development programmes; such as for promoting industrialisation, supporting Small and Medium Scale Enterprises (SMEs), modernising and developing rural areas, ensuring food security, and promoting social justice; Africa has insisted on preserving policy space. This policy space would be restricted by rules that prevent certain measures to achieve these objectives, and by rules that require non-discriminatory treatment between foreign investors and SMEs and other local investors.

D, DEVELOPMENT FINANCING

19. The European Union remains a major development partner for Africa, which is welcome; but Africa takes the view that there is a lot of room for doing much more.

20. Under the 10th European Development Fund, the European Union has committed 22.7 billion euros for ACP countries. And under the Aid for Trade Initiative, the EU has undertaken to reach a target of 2 billion euros annually by the year 2010 in development assistance to developing countries, a significant portion being devoted to EPA related programmes. According to assessments done by the negotiating groups, these amounts are well below the development needs arising from the negotiation and conclusion of EPAs. In the case of ESA, the amounts will meet only about half the programmed needs of the region.

21. In this regard, Africa has called for additionality of resources (more resources) and for establishment of an EPA Facility. The EU has taken the position that there cannot be any additional resources to the EDF amount. It is well to recall that the Aid for Trade Initiative – a laudable initiative – was conceived and agreed in the World Trade Organisation; and that various other developed countries have also undertaken to meet certain targets in their development cooperation.

22. Mobilisation of resources should therefore be scaled up, including from other donors. However, mere statements that this will be done can only be unsatisfactory. Concrete measures and programmes for this effort are required, so that accompanying measures can be credible. To promote sustainable development, adequate resources

should be provided on a stable, predictable and consistent basis, preferably through legally binding commitments.

23. The procedures of the European Development Fund (EDF) are famous for their complexity. Disbursements have been low; constituting significant gaps between amounts committed and amounts actually received in development cooperation.

24. Africa has therefore called for simplification of the procedures, and for the use of African regional financial institutions and funds. The COMESA Fund, which is now operational following the completion of the required ratifications of the constitutive protocol, has been seen as a good example of a regional fund through which EPA and Aid for Trade funds should be channelled for the ESA Group of countries. Also, there is agreement that regional funds should be established for the West African and CEMAC negotiating groups. The same arrangement should be in place for SADC. The European Council has also recommended the use of regional funds. The European negotiators, together with African negotiators, should therefore ensure that EPAs duly provide for the regional funds.

E, ECONOMIC INTEGRATION

25. According to the Cotonou Agreement and the negotiating mandates of the parties, EPAs are supposed to build upon and support regional integration in Africa. Again, the emphasis given to regional integration is welcome, as the economic integration of Africa is the overarching development strategy adopted by Africa. But again, the practice significantly differs from the rhetoric. Africa has been firm in insisting that EPAs must not undermine the process of economic integration in Africa.

26. Projections are that with reciprocal trade under EPAs, intra-Africa trade will be reduced by up to 16%; and that European imports will displace intra-regional exports. Such reduction of intra-Africa trade does not promote and strengthen economic integration in Africa; rather, it enhances the lopsided colonial oriented trade structures.

27. European negotiators have been advancing the position that the negotiating groups should adopt a single starting line (SSL) or a common external tariff, as the basis for negotiations and for elimination of tariffs on imports from the European Union. Both COMESA and ECOWAS are still in the process of elaborating their customs unions and finalising their Common External Tariffs. SADC's integration programme is for forming a customs union in 2010. The European negotiators have been unrelenting in their pressure on the negotiating groups to have SSLs.

28. Membership in the four negotiating groups is in all cases different from the membership of the regional economic communities (RECs) recognised by the African Union. The SADC EPA configuration excludes several of the members of the REC recognised by the African Union as SADC. The ESA EPA group is not the same as the COMESA. In Central Africa, CEMAC is not the same as ECCAS. And in West Africa, Mauritania is part of the West African EPA group.

29. If the negotiating groups adopted single starting lines as proposed by the European Union, or became customs union under EPAs, this would undermine or conflict with the programmes for the recognised RECs. The RECs have comprehensive

programmes along the lines of the programme for building the African Common Market and the African Economic Community under the Abuja Treaty – covering areas falling outside the scope of EPAs. These programmes include the building of customs unions, common markets and monetary and economic unions. If priority shifted to EPA programmes away from the other integration programmes, the integration process could stagnate or be set back.

30. Further, the African Common Market will adopt a continental regime covering trade in goods and services, movement of labour and capital, establishment of companies, etc; and at the same time maintain a common external trade regime agreed at the continental level. EPA configurations and the positions advanced by the European Union do not match the continental programmes; and pre-empt or undermine them.

31. In this regard, then, the preferred scenario would be for Africa to have a common front in relations with third countries including the European Union. In practical terms, this would require an African Customs Union or Common Market as envisaged in the Abuja Treaty. A second best scenario would be at least an all-Africa EPA configuration, which would negotiate and conclude one EPA with the European Union. It will be recalled that the European Union was not in favour of this scenario when the four EPA configurations of Africa were formed. It may be granted that, without effective leadership at the time, with the African Union still facing teething problems, the four negotiating groups adopted those configurations with the agreement of the European Union.

32. The European Union has recognised the importance of One Africa, for instance under the Joint Europe-Africa Strategy. This is a positive development that should now be extended to EPA negotiations as well, as may be appropriate.

33. Africa has called upon the European Union to assist in the coordination and harmonisation of the outcomes of the EPA negotiations particularly by not promoting divergences among the negotiating groups. The European Commission and the African Union Commission maintain close working relations. The European Commission should use this opportunity to assist the African Union Commission in the coordination of EPA negotiations among the negotiating groups. As pointed out earlier, the African Union Commission continues to coordinate the negotiations through coordination meetings and especially through organising the African Union Trade Ministers' meetings.

34. Africa has called upon the European Union to respect and abide by the outcomes of the efforts of the African Union in the rationalisation of the integration process in Africa. This process is ongoing but significant progress has already been registered, such as the recognition of 8 RECs, and the coordination and harmonisation among the RECs themselves particularly in West Africa and Southern and Eastern Africa.

35. Above all, Africa has called for the consolidation of regional markets, including building of regional infrastructure, promoting of inter-connectivity, and strengthening of common markets through elaboration of regional regimes in trade-related areas such as investment.

36. According to Africa, rather than opening African markets to European imports, priority should be given to enhancing intra-Africa trade through strengthening regional integration. Studies have shown that South-South trade is increasing faster than North-

South trade. Many Africa countries are increasingly trading more with partners in the regional integration groups than with developed countries. For instance, COMESA is now Kenya's leading export market, ahead of the European Union. This trend has the potential to grow and should be encouraged.

F, WTO COMPATIBILITY

37. A major reason for negotiating EPAs is to put in place WTO-compatible trading arrangements. However, the substantive WTO rules on regional trade agreements have not been clarified, as the negotiations are not finalised. There is no clarity and agreement on key issues, such as how to satisfy the requirement for free trade areas and customs unions to cover substantially all the trade among the parties where some are developing or least developed countries, or how long the transition period can be in exceptional circumstances.

38. This lack of clarity has so far been used by the European negotiators to insist that EPAs should be free trade areas where LDCs will also be required to reciprocate trade concessions, and not to accept the 25-year transition periods some negotiating groups have proposed. They continue to say that there is sufficient flexibility in the WTO rules in Article 24 of GATT for pro-development EPAs.

39. When the Cotonou Agreement was concluded on 23 June 2000, the world was awash with the expectation that there was going to be a millennium round of multilateral trade negotiations, as some already referred to it. The 1999 Seattle Ministerial Conference had already tried to launch the round of negotiations. ACP countries protested the proposals for EPAs in the negotiations for the Cotonou Agreement, and argued that WTO rules on regional trade agreements were unsuitable for RTAs between developed and developing countries, particularly Article 24 of GATT.

40. Intensive discussions were ongoing on the Singapore Issues of Investment, Government Procurement, Competition, and Trade Facilitation, since the 1996 Singapore Ministerial Conference. The Working Groups established at that Ministerial Conference were to undertake a study exercise in these areas and outcomes were still pending.

41. Then at the Doha Ministerial Conference on 2001 where the current WTO negotiations were launched, and on the same occasion the current WTO waiver granted, it was agreed that the WTO negotiations would end not later than 2005, while the waiver would be in place until December 2007. Regarding the Singapore Issues, it was agreed that the Working Groups would continue their work. This context explains some of the decisions and agreement reached at the conclusion of the Cotonou Agreement and also in the adoption of the negotiating mandates on EPAs.

42. On compatibility of the new trade arrangements with WTO rules, the Cotonou Agreement provides that EPAs would be compatible with the rules "then" prevailing. The understanding was that new WTO pro-development rules would be in place, at the end of the WTO negotiations, with which EPAs would be compatible when subsequently concluded. On this basis, it is plausible to take the view that WTO negotiations should be concluded ahead of EPA negotiations. If EPA negotiations are concluded ahead of the WTO negotiations, along the lines of the proposals advanced by the European negotiators, work in WTO negotiations on elaborating pro-development rules on regional

trade agreements might be abandoned as the ACP Group, the protagonist for reforming the rules, might not maintain interest in having the rules changed. Alternatively, the EPAs might have to be re-negotiated if WTO rules are subsequently changed along the lines proposed by the ACP group in their submission to the WTO Negotiating Group on Rules; namely, introduction of special and differential treatment rules in Article 24 of GATT.

43. On the Singapore Issues, the understanding was these issues would be treated on the basis of the outcome of multilateral negotiations in the WTO. The EPA negotiating guidelines of the European Commission take this approach. At the multilateral level, it was agreed, including on the basis of EC positions, that the Singapore Issues should not be part of the WTO negotiations except trade facilitation. The G90 group of countries, mainly the ACP countries, agreed to negotiate trade facilitation partly on the basis of the EU promise of “a round for free”, meaning that they would not be required to reciprocate concessions made to them.

44. According to UNCTAD, World Bank and UNIDO studies, adoption of rules on Singapore Issues will not result in increased flows of foreign direct investment into Africa. What is required is rather the building of infrastructure and stability of the macro economic environment, improvement in the safety of life and generally the rule of law and democracy; it is such factors which will make African regions to be attractive destinations for foreign investment.

45. At the Dialogue between ACP Ministers and EU Development Ministers held in Bonn on 13 March 2007, the ACP side gave its views on how investment should be addressed. The ACP side called for the implementation of the investment facilities provided for in the Cotonou Agreement and for infrastructure building. The side pointed out that enhanced market access to global markets will be an important determinant in decisions to locate and invest in ACP regions.

46. One would expect, then, that the rules aspects of the Singapore Issues, except trade facilitation, should not, in accordance with the outcome at the multilateral level, be introduced into EPAs.

47. However, as decided by the African Union Trade Ministers on 14 April 2006 at the Nairobi meeting, the regional economic communities should be able to adopt their regional instruments on investment, competition and government procurement to apply among the member states of the regional economic community, within the framework of forming their common markets where there is free movement of goods, services, capital, labour, and persons; and the right of establishment is recognised.

G, MARKET ACCESS

48. The European Commission has made a uniform offer to all the six ACP regions for duty free quota free access to the European Union markets for all ACP goods except that sugar and rice will be subject to transitional measures. As ACP regions have made this demand for a long time, the offer is a step in the right direction.

49. Africa has consistently pointed out that market access, such as the EBA Initiative, is welcome but inadequate by itself. Market access will not be utilised if the African producers and exporters do not have the production and supply capacity to

meaningfully take up the market openings. To this end, African countries have insisted that market access should be accompanied by adequate measures to build production and supply capacity.

50. Also duty free quota free market access will not be effectively utilised if non-tariff barriers restrict entry of goods. There are numerous types of non-tariff barriers, including lengthy or complicated customs procedures, and packaging and labelling requirements, or if access to necessary market information is deliberately made difficult. Substantive technical and health standards have been singled out as too costly or technologically difficult to comply with. Private sector organisations are increasingly setting rapidly changing and costly standards, which may not be scientifically necessary. Measures are therefore required to simplify and shorten customs procedures, and to make necessary market information readily available and usable.

51. Standards, including private sector standards, should be regulated in order to prevent their use as disguised restrictions to trade and so that they are used, for health standards, where there is a scientific justification; and for technical standards, to promote safety and complementarity and increase international trade.

52. In addition, market access will not be effectively utilised if restrictive and cumbersome rules of origin are in place. Rules of origin should be simple and flexible and easy to use for African producers and exporters. They should promote industrialisation and value addition by being in line with current trade and production structures particularly the fact that inputs may be sourced from diverse sources, and such production can still assist in providing employment and linkages into the economy.

53. Work on simplification of rules of origin should continue, with the aim of making them easy to use for African producers and exporters. They should be simple and flexible, and reflect current production and trade structures in order to promote industrialisation and value addition in Africa.

54. The sugar exporting ACP countries have raised certain fundamental concerns. They have pointed out that the offer aims to abrogate the Sugar Protocol, which is an agreement on indefinite duration. The offer is inconsistent with the terms of Article 36.4 of the Cotonou Agreement, which provides guarantees for these countries. The Caribbean region has also raised concerns about including bananas in the offer, and would have preferred bananas to be treated as a sensitive product. Within Europe, 10 countries led by France also want certain restrictions for bananas.

I, WAY FORWARD

55. From recent joint ministerial declarations with the European Commission, the negotiating groups seem disposed to conclude EPAs by December 2007, covering aspects of development and market access, with the understanding that negotiations will continue in other outstanding areas – phased EPAs.

56. However, this now needs to be put in context. The ACP Council in its Decision on EPAs of 24 May 2007, in paragraph 1 urges “the ACP negotiating regions and the European Commission to make every effort to deal with the outstanding negotiating issues in order to ensure that all concerns and interests of ACP States are fully taken on board”;

and in paragraph 2, it calls on “the European Union and the European Commission to ensure that irrespective of the outcome of the negotiations, no ACP State is left worse off. Furthermore, the EC should adopt the necessary transitional measures so as to avoid any disruption in the ACP exports to the EU beyond 2007”.

57. On the other hand, the Decision mandates ACP ministers to meet in “the second half of 2007 to assess progress in the negotiations and address all outstanding issues that may hinder the timely conclusion of the negotiations”, through deciding on “the roadmap and calendar of activities to be followed in the finalisation and signature of the EPAs”. As can be expected, this consensus language was to accommodate all the six negotiating groups, bearing in mind that progress in the negotiations is at different levels.

58. By all accounts, a lot of work remains to be done even in the two areas of development and market access; and divergences still remain on key issues, such as the rules of origin criteria for giving originating status to products, transition periods, and scope of coverage of liberalisation. In the area of development, there is yet no agreement on whether there will be a full-scale chapter or whether the details will be moved to other sectoral chapters and to the matrix. Other groups are yet to start concrete work on drafting the text for the EPAs. It is important to address the exact scope of phased EPAs and the modalities for conclusion of the negotiations, in order to ensure that the groups conclude harmonious and pro-development EPAs that support and are in line with the integration process in Africa, particularly the formation of the African Common Market.

59. The ESA group has done quite a lot of work towards preparing the text for their EPA. Other groups are not as advanced in text preparation. Perhaps they could learn from the ESA experience as may be appropriate, and ESA is also likely to have much to learn from them. There is merit in proposing that the groups should invite each other to their meetings and negotiations, so that they can share text and experience.

60. Regarding modalities for conclusion of EPAs, some consideration could be given to the harmonisation, or possibly the merger, of all the negotiating groups in Africa at the time of conclusion of the EPAs. Another possibility could be to continue to strongly urge the European side and the African Union member states as well as the negotiating groups to take all measures to preserve the unity of Africa as One Africa and in this regard to avoid the balkanisation or division of Africa along lines that could make the formation of the African Common Market difficult. It is to be noted that Europe has undertaken in the Africa Strategy to deal with Africa as One Africa, and to support the unity of Africa and the integration process.

61. The approach of concluding phased EPAs requires additional clear provisions on how and when the outstanding issues will be addressed, particularly in the areas where ACP countries have offensive interests.

62. Countries that conclude EPAs by December 2007 will still have to go through domestic procedures for approval and domestication of the agreements, a process that could be lengthy. It is critical that transitional measures are put in place to ensure that trade is not disrupted after December 2007. The measures should be publicised and known in advance by the business community in Africa and Europe, as orders are placed up to a year or so in advance and trade relations require continuity and stability.